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Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted] 57

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,

Petitioner,

versus

UNIVERSAL INSURANCE COMPANY, A BODY CORPORATE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE FORBES,
HENRY L. WORTCHE,
Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

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LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,

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versus

UNIVERSAL INSURANCE COMPANY, A BODY CORPORATE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Lanasa Fruit Steamship and Importing Company, Inc., a body corporate, Petitioner, prays that a WRIT OF CERTIORARI issue to review the judgment and order of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above case on April 6th, 1937, affirming the judgment of the District Court of the United States for the District of Maryland.

SUMMARY OF THE MATTER INVOLVED.

The Petitioner filed its Declaration in the Court of Common Pleas of Baltimore City, on a marine policy of insurance covering a cargo of bananas, the declaration alleging that the plaintiff was the owner of a cargo of bananas shipped aboard the Norwegian steamship "Smaragd" in July, 1935, from Cuba to Baltimore, Maryland, on which the respondent had issued a policy of insurance to the Petitioner whereby the respondent promised to pay the petitioner on damage accruing to it by reason of destruction of or injury to the said cargo of bananas whether by perils of the sea or by fire or explosion or by stranding not in excess of $35,000.00.

That while said policy was in full force and effect, the "Smaragd" with a cargo of bananas aboard was proceeding up the Chesapeake Bay to Baltimore on July 21st, 1935, and went aground and stranded off Seven Foot Knoll and before she could be floated, the cargo of bananas became over-ripe and rotted, resulting in a total loss to the Petitioner in the sum of $20,229.00, which loss was due to a cause insured against under said policy; that the Petitioner furnished the requisite proof of loss, but the respondent refused and neglected to pay the same (R. 2-4).

There was attached to and made a part of the declaration the insurance policy (R. 5-16), the general clause of which, and on which Petitioner relied, providing as follows:

> "Touching the ADVENTURES AND PERILS which the said UNIVERSAL INSURANCE COMPANY is contented to bear, and take upon itself, in

this voyage, they are OF THE SEAS, men-of-war, fires, enemies, pirates, rovers, assailing thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes, or people, of what nation, condition or quality soever, barratry of the Master and Mariners, and all other perils; losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. * * * to the charges whereof, the said UNIVERSAL INSURANCE COMPANY will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance by the assured or his or their assigns, at and after the rate of AS AGREED." (R. 5-6).

To the declaration respondent filed four pleas, the first two being the general issue pleas and the third and fourth being special pleas (R. 17-18).

The third plea set up a *cancelled* rider on the policy as a defense, which rider was not only not in effect at the time of the loss and was not a part of the contract sued on, but as hereinafter shown in our brief, had absolutely nothing to do with a loss such as here sued on, which is for a *total* loss and not for a *partial* loss to which solely the rider applied. That plea (R. 17) was as follows:

"3. And for a third plea, that on or about April 4, 1934, in consideration of an increased premium, its policy of insurance referred to in the plaintiff's declaration was extended by indorsement at the request of the plaintiff to cover loss by decay, injury or damage to fruit in consequence of delay resulting from stranding. Said indorsement was in the form annexed hereto marked 'Exhibit A', and made a part hereof as fully as if set forth at length herein. And

that on or about January 16, 1935, and before the stranding alleged in the declaration, the coverage against damage in consequence of delay granted by said indorsement dated April 4, 1934, was cancelled by indorsement dated January 25, 1935, which provided—

'It is hereby understood and agreed that indorsement attached to this policy dated April 4, 1934, is cancelled in respect of shipments made on and after January 16, 1935, and *thereafter this policy covers the same as prior to the attachment of that indorsement,* and the rate is reduced from 60¢ to 25¢.' " (R. 17).

The pertinent part of the rider exhibit referred to and filed as a part of the pleas is as follows:

"April 4th, 1934.

"Endorsement to be attached to and made part of policy No. 12872 of the Universal Insurance Company of Newark, N. J., issued to Lanasa Fruit Importing Company, Inc.

"It is hereby understood and agreed that effective as to all shipments made on and after date this policy is amended to cover as follows:

"Free of PARTICULAR AVERAGE unless the vessel be stranded, sunk, burned, on fire or in collision, in any, all or several of which events the insurers are liable for *such loss* by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom. Insurers are liable also for *such loss* in consequence of delay resulting from any, all or several of the following causes; i. e. breakage of shaft, loss of blades from propeller, derangement or breakage of machinery, derangement or breakage of rudder and/or sternpost, whether or not the vessel be stranded, sunk, burned, or in collision, provided that

in all cases the loss amounts to 10% after deducting 5% for ordinary loss.

* * * * * *

"All other terms and conditions remaining unchanged." (R. 19-20).

The fourth plea set up a defense which is not necessary to here refer to as both the District Court and the Circuit Court of Appeals held, as Petitioner had contended, that the clause in the policy therein pleaded by Respondent had nothing to do with this case.

To these special pleas the Petitioner demurred for the reason that they set up no pleadable defense to the Declaration for the reasons therein set forth and joined issue on the general issue pleas (R. 20-1).

THE OPINION OF THE DISTRICT COURT.

The District Court held that this plea was an absolute defense to the Petitioner's Declaration, and finally disposed of the case by thus ruling on the pleadings, and it could, therefore, not be submitted to the jury, holding that the general clause heretofore quoted did not cover the loss of the cargo of bananas which was brought about by a delay due to the stranding of the vessel, basing his holding on the British decisions of *Taylor vs. Dunbar,* L. R. 4 C. P. 206, and *Pink vs. Fleming,* L. R. 25 2 B. D. 396, and discarding the rule that such loss was covered as laid down by the cases of *The Corsicana,* 203 N. Y. Sup. 10, affirmed *per curiam,* 239 N. Y. 573, 147 N. E. 201, *Tudor vs. New England Insurance Co.,* 12 Cush. (Mass.) 554, *Magoun vs. New England Marine Ins. Co.,* 1 Story 157, 16 Fed. Cas. 483; *Brown vs. St. Nicholas Ins. Co.,* 61 N. Y. 332, *Providence Wash. Ins. Co. vs. Adler,* 65 Md. 162, 4 Atl. 121, *Musgrave vs. Mannheim Ins. Co.,* 32 Nova Scotia Reports 405, *Rodocanachi vs. Elliott,* L. R. 9 C. P. 518.

THE DECISION OF THE CIRCUIT COURT OF APPEALS.

By opinion not yet reported, the Circuit Court of Appeals affirmed the decision of the District Court, adopting the British Rule and discarding the American Rule, stating at (R. 44):

> "and, the state of the authorities being what it is in this country and there being no contrary decision by the Supreme Court or any federal court, we feel that the English rule should be followed, as in cases of marine insurance it is highly desirable that our decisions be kept in harmony with those of England, 'the great field of this business.' * * * Plaintiff argues that the decisions of the New York courts should be followed in interpreting that contract because it was made in that state. Assuming the fact to be as stated, although this does not clearly appear from the record, the conclusion does not follow, for it is well settled that, in the interpretation of contracts of insurance the federal courts, in the absence of statute, follow the general law and are not bound by state decisions."

QUESTION INVOLVED.

The question involved is: Does the general clause of the marine cargo insurance policy, insuring for loss caused by perils of the sea, cover a loss where a marine peril, viz: stranding, has so delayed the voyage that the cargo has become a total loss?

REASONS FOR REVIEW.

We respectfully submit that this Honorable Court, in the exercise of its sound judicial discretion, will find grounds not only warranting, but making unquestionably advisable, a review of this case for—

1. The Circuit Court of Appeals (4th) has rendered a decision in direct conflict with the indicated viewpoint

of another Circuit Court of Appeals (9th) on the same matter, for while the vital issue in the instant case was not precisely there adjudicated, its decision clearly indicates that had this precise point been actually decided that it would have been contrary to the Fourth Circuit decision. (See Firemen's Fund Ins. Co. vs. Trojan Powder Company, 253 Fed. 305.)

2. If the contract in issue was a New York state contract as petitioner says it was (R. 10-11) but the Circuit Court of Appeals doubts (R. 44), an important question of local law has been decided by this Circuit Court of Appeals in a way not only "probably" in conflict with the applicable local decisions, but *actually* in conflict therewith.

But whether a *New York* State contract or not, it is equally true that an important question of law, be it local or general, has been decided by the Fourth Circuit in actual conflict with State decisions of most highly regarded State courts of last resort.

3. The Circuit Court of Appeals (4th) has decided an important question of "general law" in a way "probably untenable" and certainly in conflict with the weight of American authority which question has not been, but should be, settled by this court.

4. The British decisions and the American decisions are in conflict. The viewpoint of the Circuit Courts of Appeal are in conflict. The decision of the Circuit Court of Appeals for the Fourth Circuit is in direct conflict with most of the State decisions which State decisions, however, are in line with the viewpoint of the Ninth Federal Circuit, and this complicated situation should certainly be corrected.

It will be seen, therefore, that a confusing situation has resulted in which British law has been applied as controlling as against the law of the States of New York and Massachusetts, and that, in consequence, such a marine insurance contract again interpreted by these State courts would, of necessity, be contrary to the decision in this case. Furthermore, such a contract, in the Federal courts of these districts, might be otherwise interpreted, for the decision in the Fourth Circuit might not be followed, and the viewpoint of the Circuit Court of Appeals for the Ninth Circuit adopted. It is quite apparent from the Firemen's Fund case, *supra*, that when this issue is squarely presented to the Ninth Circuit its decision will be in conflict with this Fourth Circuit decision.

In American Courts the decision of the Circuit Court of Appeals for the Fourth Circuit is without support by Federal or State Courts. In the Ninth Circuit it is quite apparent it would not be approved, and in practically all of the State courts, of last resort, where the question has been submitted, the courts have decided in favor of the petitioner's contention here, and it is highly important, therefore, as the matter is one of great public interest, and the law of the land should be settled, that this court should review this case and decide the relative rights of parties under an important marine insurance contract of this kind—to say nothing of doing substantial justice in the instant case.

The aforegoing certainly presents a confused and complicated situation which should not be permitted to exist, and which only this court can rectify.

Wherefore, your Petitioner, referring to the attached brief in support of the aforegoing reasons for review, respectfully prays that this Honorable Court issue a *writ*

of certiorari, directing the Circuit Court of Appeals for the Fourth Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this court, as provided by law, and that the judgment of the Circuit Court of Appeals herein may be reversed, and that your Petitioner may have such other and further relief as to this Honorable Court may seem just.

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,

Petitioner.

By ANTONIO LANASA,

President.

GEORGE FORBES,

HENRY L. WORTCHE,

Counsel for Petitioner.

(*Emphasis ours throughout.*)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The vital question presented by this record is:

Does the standard general clause of the marine cargo insurance policy here involved, insuring against losses caused by perils of the sea, cover loss of a cargo of bananas where the vessel was subjected to a marine peril, viz.: stranding, which resulted in frustration of the venture, the rotting of the bananas and their total loss?

The Circuit Court of Appeals decided that it did not, following the British Law as laid down in the cases of *Pink vs. Fleming, supra,* and *Taylor vs. Dunbar, supra,* and discarding the American Law as laid down in the cases of *The Corsicanna, supra; William vs. Smith,* 2 Caines, 1, 2 Am. Dec. 209; *Tudor vs. New England Ins. Co.,* 12 Cush. (Mass.) 554; *Musgrave vs. Mannheim Ins. Co.,* 32 Nova Scotia Repts. 405, with similar viewpoint indicated by the Ninth Circuit in *Firemen's Fund Ins. Co. vs. Trojan Powder Co., infra;* and the Court of Appeals of Maryland in *Providence Washington Ins. Co. vs. Adler, infra.*

The Corsicanna, supra, decided by the Court of Appeals of New York in 1925, and of which Court Mr. Justice CARDOZO was then a member, is the latest decision on the point and is a clean-cut holding in favor of the petitioner's contention here, and seems to us conclusive.

Both the American and British cases decide the question on the law of proximate cause, the American cases holding that the proximate cause was the marine peril,

it being the efficient cause; and not the cause last in point of time. They therefore hold that the stranding, the marine peril involved, and not the consequent delay or rotting of the cargo was the proximate cause, and that there would have been no loss except for the stranding. This is but adopting the old squib case doctrine. The British cases, however, hold that the final consequence was the proximate cause and not the marine peril.

We submit that the British rule is strained and unnatural, and that the American rule is the better one, in accord with the general law of our land, on proximate cause, and more in harmony with logic and substantial justice.

Applying the British rule would mean that no matter what sea peril occurred on a voyage if the cargo was not thrown into the sea or damaged by direct contact with sea water, but was caused to rot by the delay brought about by the sea peril the loss would not be covered by the policy. If a vessel went on the rocks in the open sea and could not be salvaged, but before she broke up from the action of the sea her cargo rotted, the policy here sued on would not cover such a loss. Clearly such situation is illogical and wholly untenable.

However, that is the effect of the decision of the Circuit Court of Appeals in this case, and to reach it the Court has rejected all the well-reasoned American Law on the subject, some cases being over a century old, and adopted the strained British Law which, incidentally, is very much weakened by a later decision of The House of Lords in *Leyland Shipping Co. vs. Norwich Union Fire Ins. Soc.* (1918) L. R. App. Cas. 350.

It may be well here to remark that neither *Pink vs. Fleming* nor *Taylor vs. Dunbar* reached The House of

Lords and to note that the compilers of the British Merchant Marine Act of 1906 with astute foresight evidently thought it prudent to embody the rule in that act as it did in Sub-division 2 (b) Sec. 55. In any event, the result was to harmonize the case and statute law. In America, on the other hand, it is equally significant that The American Merchant Marine Act of 1920 has in it no such provision and *it* is, therefore, in harmony with *American* decisions. It would seem, therefore, that each nation in the compiling of their respective acts has designedly had regard for the then state of the law in each nation. *The Corsicanna* case followed in 1925 and reaffirmed the existing law of this country.

As this British statute defines what the law of England is on the question, there is now no necessity *there* for deciding the issue on the question of proximate cause, and we submit in the absence of statute in this country the rule of proximate cause as laid down in *The Corsicanna, supra,* and other cases is much more logically reasoned and should here be followed.

If there could be any doubt that the policy in this case was to be construed according to the American decisions, it is dispelled by a typewritten clause on the policy in suit titled "Special Conditions under Deck" (R. p. 12), which provides *aliunde* that the insurers are obligated to pay "*any* loss of or damage to the interests insured which may reasonably be attributed to * * * collision or contact of the vessel * * * with *any* external substance (ice included) other than water * * *."

Certainly under the clause cited, the insurers have agreed to pay for *any* loss of or damage to the interests insured which may reasonably be attributed to "* * *

contact of the vessel with any external substance (ice included) other than water, * * *" which clearly indicates that if the loss here involved could *reasonably* be attributed to the stranding it was covered. Could more be said to show that the loss was "attributable" to stranding when it is clear *there would have been no loss if the stranding had not occurred?* This makes applicable American decisions as against British decisions as the American decisions are in line with that language, and the British decisions are not.

This court, therefore, should first have in mind that the insurance contract sued on was made in the State of New York (R. 5, 10, 11, 15), where the Appellate Division and the Court of Appeals in The Corsicanna case decided, without dissent by any one of the *twelve* judges who sat in these two courts, that the clause on which petitioner sued should be interpreted not by the British decisions, which they fully considered, but by American decisions: and this case has certainly been regarded as the law throughout the United States for over a decade. It would seem conclusive, in this case, as to a contract made in that state, which next to London is the originating source of more marine contracts than any city in the world and is probably a close second to London at that.

The practical situation is, therefore, that while four Federal judges, namely, PARKER, NORTHCOTT, SOPER and COLEMAN, have passed negatively on petitioner's contention, that *twelve* judges, one now a member of the Supreme Court, have passed affirmatively on it. These judges in the Appellate Division were KELLEY, P. J., RICH, KELLY, YOUNG and KUPPER, and in the Court of Appeals were HISCOCK, Ch. J., CARDOZO, POUND, McLAUGHLIN, CRANE, ANDREWS and LEHMAN. This affirma-

tive view, furthermore, has been followed by several other courts, and numerous judges, including Mr. Justice STORY, as hereinafter pointed out. The great weight, therefore, of American authority is distinctly with the petitioner in its contention.

We realize, of course, (R. 44-5), that Federal Courts need not recognize State Court decisions if they be otherwise minded, but we do say that in equity and good conscience that as each case is dependent upon its own state of facts that in the instant case the State decisions, and particularly the New York cases, should be given special weight, for it is clear that this contract made in New York City was made with special reference to the New York law as established by *The Corsicanna* case which it is inconceivable was not known to the insurers since *U. S. Lloyds* was there the party defendant. We say that the policy was a New York contract. The Circuit Court of Appeals, though "assuming the fact to be as stated," has some doubts apparently about it (R. 44), but the facts were these:

The Insurance Company, though a New Jersey corporation (R. 5), had as its General Manager Talbot Bird & Company, Inc., of 51 Beaver Street, *New York City* (R. 5. 10, 11, 15). The policy was signed by its president and secretary by facsimile *printed* signatures at its office in New Jersey but was made and accepted upon the express condition that it "shall not be *valid* unless countersigned by Talbot Bird & Company, Inc., General Managers of the Company", and it was so countersigned "at New York this 23rd day of June A. D. 1933" by "Universal Insurance Company, Talbot Bird & Company, Inc., General Managers, and James G. Manton, Attorney," (R. 10). It is a well-known practice of insur-

ance companies, whether marine or fire, to prepare blank policy forms with the signature of the company officials *printed* in but to provide that they only become valid *id est;* only became contracts, when signed by General Managers, Agents or by Attorneys as here. The policy, therefore, only became a contract between the parties when validated by the execution of said policy by the signature of its General Manager and Attorney at New York. In other words, it only *there* became an effective and valid contract. Prior to that it was without effect or binding power.

On this state of facts we submit the contract in question was clearly a New York State contract and the State court decisions should govern, but even if not held to be controlling, on the assumption that its construction depended on questions of general commercial law on which Federal courts are at liberty to exercise their own judgment, we find no Federal court decision supporting the opinion of the Circuit Court of Appeals for the Fourth Circuit, but that on the contrary the only Federal court opinion, (although not flatly deciding the point), indicating beyond question that had the precise point been before them, their decision would have been contrary to the Circuit Court of Appeals decision in the instant case. We refer to the unanimous decision of the Ninth Circuit in the case of Firemen's Fund Insurance Company, 253 Fed. 305.

Wholly aside, however, from the question of whether this contract is a New York State contract or not, since the company was a New Jersey corporation and the policy was validated in New York and delivered in Maryland, it was of necessity a contract wholly American in its every aspect and being such there can be no justifica-

tion for applying British statute or case law to its interpretation.

The Court will also have in mind the familiar rule, which does not need citation of authority, that in construing policies of this kind they must be *liberally* construed in favor of the insured, and *strictly* interpreted against the insurance company.

There can be no dispute, and we do not understand that there is, that stranding is a *peril of the sea.*

Richelieu, etc. vs. Boston Marine Ins. Co., 136 U. S. 408, 34 L. Ed. 396
American Hawaiian S. S. Co. vs. Bennett, 207 Fed. 510.

And this was so held by the Circuit Court of Appeals (R. 39).

That such a loss, as was here sustained, is clearly covered by the *general* clause of the policy, *supra,* would seem to be unquestioned by virtually all the authorities in this country.

Having in mind the Declaration in the case at bar, and that the loss was due to the stranding of the vessel, which occasioned a complete frustration of the venture, and the resulting delay causing the bananas to rot and their never reaching their destination, Respondent's contention is no defense, and it has been so held in the leading case in the United States on the point, in which case all prior law, both American and English, is fully considered and ably discussed.

The Corsicanna, 1924 A. M. C. 365; 203 N. Y. Supp. 10, affirmed *per curiam,* 239 N. Y. 573; 147 N. E. 201.

In that case a steamer carrying a shipment of potatoes from New York to Cuba struck a submerged object, and had to put into Charleston, S. C. While there the potatoes (*although not injured in the collision or touched by sea water*) had to be sold on account of sprouting and rot. If the vessel had not put into Charleston for repairs, due to striking the submerged object, there would have been no damage to the potatoes—an identical situation to the case at bar—except that our cargo rotted when the vessel was still aground, which makes our case the stronger!

The clause in that case (*the clause on which we have sued*) was identical with the clause in the case at bar.

The Appellate Division, at p. 11 of 203 N. Y. Supp., said:

> "The precise question presented by this submission relates to whether loss by natural deterioration, during *a delay* in the voyage caused by a sea peril, is a loss by sea perils, within the meaning and intent of the policy of insurance,"

which is *precisely* the question here.

The Court further said, at pp. 11-12:

> "*Plaintiffs contend that, where the predominant cause of the loss is a sea peril, the underwriters are liable, although a contributing cause may have been deterioration and delay.* They cite Williams v. Smith, 2 Caines, 1, 2 Am. Dec. 209; Tudor v. New England Mutual Marine Ins. Co., 12 Cush. (Mass.) 554; Musgrave v. Mannheim Insurance Co., 32 Nova Scotia, 405 (1899). *They urge that the cause which is truly proximate is not proximate in time, but proximate in efficiency.* Leyland Shipping Co. v. Norwich Union Fire Insurance Society, [1918] L. R. App. Cases, 350; The G. R. Booth, 171 U. S. 450, 459,

460, 19 Sup. Ct. 9, 43 L. Ed. 234. Defendant asserts, however, that in order to render it liable it must be shown that the loss is proximately due to one of the known perils, of which retardation or delay of the voyage is not one, and in support of its contention cites Taylor v. Dunbar, L. R. 4 C. P. 206; Pink v. Fleming, L. R. 25 Q. B. D. 396; The Alps, [1893] L. R. Probate Div. 109-116; Reischer v. Borwick, [1894] L. R. 2 Q. B. 548; Inman Steamship Co. v. Bischoff, L. R. 7 A. C. 670-676; Perry v. Cobb, 88 Me. 435, 438, 34 Atl. 278, 49 L. R. A. 389; Firemen's Fund Ins. Co. v. Trojan Powder Co., 253 Fed. 305-311, 16 C. C. A. 87; Cory v. Boylston Insurance Co., 107 Mass. 140, 144, Am. Rep. 14; Moses v. Sun Mutual Insurance Co., 1 Duer, 159."

"The question presented has not been considered in any of the courts of this state since 1804. Williams v. Smith, supra. In that case, in which Hamilton and Riggs appeared as counsel, Judge Kent, writing for the court, held that, if a vessel be driven into a port of necessity and a pestilential disorder break out, which renders it impossible for her to pursue her voyage, it is a loss within the perils of the policy. The court said:

"' 'We are satisfied that the damage resulting from the pestilence at Cadiz is covered by the policy. It is not requisite to decide absolutely whether a pestilence is a peril direct within the policy. *It formed, however, a sound excuse for delay at Cadiz, and if the consequence of that delay was a deterioration of the subject insured, the insurer must be answerable for the loss.*' "

In *Williams v. Smith,* 2 Caines' Reports 1, the action was to recover on a policy covering the cargo of the ship Prosper, on a voyage from New York to Algiers. The cargo consisted principally of naval stores, including tar in barrels.

After leaving New York, the vessel met with heavy weather, began to leak and was compelled to put into Cadiz as a port of distress. At Cadiz a large part of her cargo was discharged and repairs were made. While the vessel was at Cadiz, fever broke out in the port, which so interrupted all business as to make it impossible for the master promptly to reload that part of the cargo which had been discharged. In the meantime the vessel was driven to sea by a gale, and, on her regaining Cadiz, a survey was held on the cargo. The surveyors reported that the cargo "both on shore and on board, from the heat of the climate and violence of the gale was deteriorated more than one-half of its original value." The cargo owner accordingly gave notice of abandonment to his underwriters.

At the trial of the action the court charged the jury—

> "That any damages which arose in consequence of the fever at Cadiz, were *within* the perils of the policy."

This charge was excepted to, and, on motion for a new trial, counsel for the underwriters argued that—

> "The loss was from a peril not within the policy. It was the consequence of *a delay* arising from a pestilential fever; and though the instrument, after enumerating the particular risks insured against, adds, 'all other perils,' &c., still, according to the known rule of law, they refer to those only of the same kind."

The Court, however, disagreed and held as above quoted.

The only answer of the Respondent to this argument is that the *English* cases of *Taylor vs. Dunbar,* L. R. 4 C. P.

206, and *Pink vs. Fleming,* L. R. 25 Q. B. D. 396, held, that delay was not covered under the general clause of a policy under the "perils of the sea" provision, basing their holding on the question of proximate cause as *that* Court construed proximate cause. If this was the law of this country the Petitioner here could not recover, but as argued and as fully set out in *The Corsicanna, supra,* this is *not* the law in the United States, either Federal or State.

That the British Rule is wholly at variance with the American Rule is clearly shown by what Lord ESHER said in *Pink vs. Fleming,* as quoted by the Appellate Division in *The Corsicanna,* at p. 13 of 203 N. Y. Supp., viz:

> "According to the English law of marine insurance only the last cause is to be regarded. • • • *with regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them.*"

But in *The Corsicanna* the Court suggests that the grounds of the English decision are in apparent conflict with a later pronouncement of The House of Lords in the case of *Leyland Shipping Co. vs. Norwich Union Fire Ins. Society,* (1918) L. R. App. Cas. 350, saying at p. 13:

> "The ground of this decision that only the last cause can be regarded is *patently in conflict* with a later pronouncement of the House of Lords in the Leyland Case, supra, cited by the plaintiffs, in which a ship, having been torpedoed, proceeded to Havre, where she was anchored at a quay. Because of a storm the following day, she was anchored in the harbor, but at the fall of the tide she grounded, and because of the strain on her hull sank. The question presented for decision was whether the loss was due

to sea or war perils, which were excepted by the policy, and in holding that the proximate cause of the loss was the *torpedo attack,* Lord Shaw said:

> *'To treat proxima causa as the cause which is nearest in time is out of the question. * * * The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved, although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.'"*

And then after referring to a number of other cases sustaining the contention of the Petitioner here, the Court at p. 14 says:

> "Williams vs. Smith, supra, is another illustration of the doctrine enunciated by this case, which lays down a rule entirely different than that in the class of cases exemplified by Taylor vs. Dunbar, supra."

The Court then holds that the contention made by the Respondent here is *not* sound.

We feel that this is conclusive of Petitioner's argument on this point, but other decisions referred to in the opinion in *The Corsicanna* case, and other cases, clearly show the logic and correctness of that holding and that the decision of the Circuit Court of Appeals in this case is not only erroneous, but does not do substantial justice.

In *Tudor vs. New England Insurance Company,* 12 Cush. (Mass.) 554, the decision of the court is stated in the headnote as follows:

> *"If an article insured as free from average be placed in such a condition by the perils of the sea,*

that in consequence of inevitable deterioration or decay, it cannot reach the port of delivery, but will necessarily be destroyed before its arrival, and the same be sold at an intermediate port, this will constitute a total loss within the true intent of the policy."

The facts were that a cargo of ice had been insured against marine perils on a voyage from Boston to Calcutta.

Shortly after sailing the vessel sprang a leak and it became necessary for her to put into Bahia, Brazil, as a port of refuge. At Bahia the ice was discharged and it was found that a small portion had been melted by sea water. After the discharge, the whole cargo was sold at Bahia for the reason that if it had been sent forward to Calcutta, the port of destination, it would have become a total loss.

The court held that, under these circumstances, the ice had become a total loss and that the underwriters were liable, saying:

"The rule of law is now well settled that, under an insurance upon an article free from average, *if by reason of the perils insured against, it is placed in such a condition, that in consequence of inevitable deterioration or decay,* it cannot be carried to the port of destination, but will necessarily, before the completion of the voyage, be wholly destroyed, and it is accordingly sold, at an intermediate port, this will constitute a total loss within the true intent and meaning of the memorandum clause. * * * If, therefore, by reason of the perils insured against, it is rendered certain in the course of the voyage, that the article insured will inevitably perish or waste away, or that on arrival, it will cease to exist, it is a

> total loss under the memorandum clause; and a sale of the article, at an intermediate port, in which the vessel is by reason of distress, will be justified, and the proceeds will become a salvage for the benefit of the party who is to bear the loss. In such case it is clear that the loss is total, because, if the voyage had been pursued and completed, the articles insured would have ceased to exist, and thus been totally lost, within the meaning of the policy, at the port of destination. The sale, therefore, at the intermediate port, does not at all change the rights of the parties under the policy, but saves something for the benefit of the insurers, which would otherwise be wholly lost." • • • (12 Cush. 556).

In *Musgrave vs. Mannheim Insurance Co.*, 32 Nova Scotia Reports 405 (1889), the plaintiffs had insured with the defendants the freight, amounting to $4,773, of the Steamship Tyrian, on a voyage from Halifax to Havana.

Shortly after leaving Halifax, the Tyrian met with a heavy gale, which caused a breakdown of her machinery. After drifting about for some days, she was picked up by another steamer and towed to Bermuda.

In order to repair the Tyrian, it was necessary to discharge a large part of the cargo, which consisted of 7,000 barrels of potatoes and 285 drums of dried fish. It was found that the cargo *had not received damage from contact with the sea, but showed symptoms of decay.*

The cargo owners refused to allow the potatoes and fish to remain at Bermuda until repairs could be effected on the ground that the cargo could not bear the delay. At their request the cargo was redelivered to them and taken back to Halifax.

At the trial of the case the jury found that if the cargo had been sent forward on the Tyrian to Havana after the repairs had been effected, it would have become substantially a total loss.

The question before the Court was whether the freight had been lost by perils of the seas, counsel for the insurance company arguing that the proximate cause of the loss was *delay*, and the perishable nature of the cargo, and that consequently the underwriters were not liable.

The Court held that *the loss was due to perils of the sea* and that the underwriters were liable.

In an elaborate opinion Graham, J., likens the case to a suit brought to recover for a loss of perishable merchandise under similar circumstances, saying:

> "The analagous cases in which the insurance was on cargo, and cargoes were held to have been lost through a destruction of the adventure, *are very strong to show that delay and the perishable nature of the cargo do not intervene, as a more immediate cause between the accident to the ship and the loss of the cargo.* Indeed, as I understand the authorities, *they constituted the turning point of the case against the underwriter.* The loss of the subject by the loss of the venture is an old doctrine of insurance law going back to the time of Lord Mansfield, who applied it very liberally, and Lord Ellenborough, who restricted it, and, except as to the doctrine of ships being lost through a loss of the voyage, which has become obsolete, is still in force. The views of these great men are referred to by Story, J., in Peele v. Merchants' Ins. Co., 3 Mason, 68, who evidently sided with Lord Mansfield." (32 Nova Scotia Rep. 430.)

Further on Graham, J., quotes from the opinion of Lord Bramwell, in *Rodocanachi vs. Elliott,* L. R. 9 C. P. 523, as follows:

> "It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, to a destruction of the contemplated adventure." (32 Nova Scotia Rep. 430-1.)

Continuing, Graham, J., refers to Marshall on Insurance (Edition of 1823), 596:

> " 'When the insurance is on goods, the loss of the voyage for a season or any other term will operate as a total loss or otherwise, according to the nature of the goods.
>
> • • • • • •
>
> *But if the goods be of a perishable nature, so that the retardation of the voyage would operate as a destruction of them, the insured may abandon and claim for a total loss.'*
>
> "Two cases there cited for the text were afterwards used by Lord Abinger in Roux v. Salvador, 3 Bing N. C., 266. He said:
>
> 'Accordingly in the case of Hunt et al. v. The Royal Exchange Assurance Co., 5 M. & S. 47, which was cited by the Attorney General in support of his argument, the judgment of Lord Ellenborough contains a very important passage which distinguishes it from the present case. He says: "If, indeed, the cargo had been of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing assured." And further he says: "I cannot necessarily infer that the flour would be changed in quality and condition by the delay from November to April so as to incur any material damage operating a destruction of the thing in-

sured. In the case of Anderson v. Wallis, which was also relied upon, the goods consisted of copper, which was wholly uninjured, and of iron which was partially damaged. But it is clear from the judgment of the court, that if, by reason of the perils of the sea, the goods could never have been sent to their destination, the loss would have been held to be total.'

"In Hunt v. Royal Exchange Assurance Co., 5 M. & S. 47, the flour, which formed the subject of insurance, was intact so far as sea damage was concerned." (32 Nova Scotia Rep. 431-2.)

And after discussing *Hunt vs. Royal Exchange Assurance Co.*, Graham, J., adds:

"In Goss v. Withers, 2 Burr, 683, there was a capture of a ship and cargo, both insured. The vessel remained in the enemy's hands eight days, was retaken and brought into Milford Haven, and, of course, there was a claim for salvage. Part of the cargo of fish, on its way from Newfoundland to Portugal, had been taken out of her and the remainder became spoiled at Milford Haven before the vessel could be refitted. Lord Mansfield held that there was a total loss of the ship. But that is not material and was questioned by Lord Ellenborough. He adds:

'Every argument holds stronger in the case of the other policy with regard to the goods. The cargo was, in its nature perishable, destined from Newfoundland to Spain or Portugal, and the voyage was as absolutely defeated as if the ship had been wrecked and a third or fourth of the goods saved.'

"Lord Abinger speaks of that as a leading case, and Story, J., approved of it." (32 Nova Scotia Rep. 433-4.)

And after mentioning a long line of decisions, the final conclusion of Mr. Justice Graham is that:

> *"Sea perils to the cargo comprise not only the sea breaking into the ship and cargo, but also marine accidents to the hull of the ship, placing the cargo where it cannot reach its destination. In many of the cases cited, there was no contact of the sea with the cargo."* (32 Nova Scotia Rep. 440.)

The decision of Mr. Justice STORY in *Magoun vs. New England Marine Insurance Company,* 1 Story, 157, 16 Fed. Cas. 483, fully covers the present case. There the suit was brought on a policy insuring the Schooner Yankee and her freight at and from St. Thomas to Rio de la Hache, and at and from there to New York.

It appeared from the facts, which were stipulated, that the schooner, after taking on board some hides and logwood at Rio de la Hache was seized by the local authorities. The asserted ground of the seizure was the carrying on of illicit trade by the master. Court proceedings to condemn the vessel were taken, which, some four months after seizure, terminated in a dismissal and the vessel's release. When the vessel was restored "it was found from her long exposure to the weather in a hot climate, in an open roadstead, that her hull and sails and rigging were so much injured" that she could not be repaired for less than her value, and "that the hides belonging to the cargo had become rotten, and were thrown overboard."

The argument made for the defendant insurance company was that the proximate cause of the loss was not the seizure, which was a "restraint of princes" covered in the policy, but "long delay and exposure to the cli-

mate." In disposing of this argument Mr. Justice STORY, at that time sitting on Circuit in Massachusetts, said:

> "The argument is, that the injury to the vessel, by the long delay and exposure to the climate, was the immediate cause of the loss, and the seizure and detainment the remote cause only; and that, therefore, the rule applies, 'Causa proxima, non remota, spectatur,' and the underwriters are not liable for injury by mere wear and tear, or by *delays* in the voyage, or by worms, or by exposure to the climate. *But it appears to me, that this is not a correct exposition of the rule. All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself.* If there be a capture, and before the vessel is delivered from that peril, she is afterwards lost by fire, or accident or negligence of the captors, I take it to be clear, that the whole loss is properly attributable to the capture. *It would be an over-refinement and metaphysical subtlety to hold otherwise; and would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils.* The decision of the Supreme Court of the United States in Peters v. Warren Ins. Co., (at the last term), 14 Pet. (39 U. S.) 99, is directly in point; and in my judgment fully settles, that the restraint and detainment under the seizure are to be treated as the proximate cause of the loss in the sense of the rule. *The vessel was never delivered from that peril, until she was virtually destroyed and incapable to perform the voyage.*" (16 Fed. Cas. 485, 486.)

We do not see how this decision can be distinguished on any rational ground from the case at bar. Both the argument of counsel (16 Fed. Cas. at p. 485), and the opinion, show that *precisely the same point was decided,* and although the Circuit Court of Appeals in its opinion attempts to do so it is clear from their reference to it that

they do *not* do so, and dispose of it by merely stating it "throw very little light on this controversy" (R. 43-4).

In *Rodocanachi v. Elliott,* L. R. 9 C. P. 518 (Exchequer Chamber), silk had been insured while in transit from Shanghai to London. In the course of the voyage the goods were landed at Marseilles and sent forward by railroad to Paris, where they arrived on September 13, 1870. Before there was time for them to leave Paris the German armies had cut off all egress. On October 7th the assured abandoned the goods to underwriters, claiming a loss by "restraint of princes," one of the perils insured against. Prior to the trial the goods arrived in safety. In holding that the assured were entitled to recover, Baron Bramwell, who delivered the opinion of the court, said:

> "We cannot help thinking that the doubt arises through the speedy arrival of these goods uninjured. *Had they been perishable goods destroyed by the delay, it would be difficult to say that their loss was not caused by the restraint of princes.*" (L. R. 9 C. P. 523, 524.)

It would be difficult to frame a more explicit statement that underwriters are not released from liability because the physical damage suffered by the goods was due to delay, when that delay was caused by a peril insured against.

The hypothetical case put by Baron Pollock (in Naylor v. Palmer, 8 Exchequer 740, 751), is also illuminating. He there likened the case then before him to one

> "as if slaves, who had been conveyed in a vessel that was *driven on shore* by perils of the seas, and by reason thereof escaped; the perils of the sea would be the cause of a total loss of the subject insured."

In Baron Pollock's case Respondent would argue that the loss was due to the inherent characteristics of the subject matter insured, but, since the *opportunity* to escape was created by a peril insured against, Baron Pollock held that the loss was attributable to the antecedent peril.

The natural instinct of the negroes to give leg-bail to their captors is not properly distinguishable from the propensity of the petitioner's bananas to deteriorate and decay when delayed by the stranding of the vessel.

In the case of *Brown vs. St. Nicholas Ins. Co.*, 61 N. Y. 332, suit was brought on a marine insurance policy for the loss of a cargo of hay on a barge, which policy contained a clause known as the ice clause, viz.:

> "It is understood and agreed that if any boats, the cargo of which are covered by this policy, are prevented or detained by ice or the closing of navigation from terminating the trip, then in such case the policy shall cease to attach upon said cargo, and this company shall return the premium for the unexpired portion of said trip."

The canal boat, while proceeding down the Chesapeake and Delaware Canal, was blown *ashore* by a gale and separated from the steamtugs towing her and other barges. When the barge went ashore there was some ice in the river, but not enough to interfere with navigation. During the night the ice formed around the barge to such an extent the tugs could not reach her the next morning, though an effort to do so was made. The vessel remained in the ice until a thaw about fifteen days later, but when she thawed out she broke in two and was sunk, and the cargo became a total loss.

The defendant contended that it was relieved under the ice clause of the policy, as the loss of the cargo was the detention by ice. At p. 337, the court said:

> "A heavy gale drove the boat on which the cargo in question was carried on to the shore so that she was *stranded.* The detention caused by her being driven out of her course was due beyond all question to the gale. *Her detention on the shore until the ice formed around her was due to a consequence of the gale, stranding.*"

And the court held that the stranding was the *proximate* cause of the loss, and that, therefore, the plaintiff was entitled to recover under the policy.

In the case of *Providence Washington Insurance Co. vs. Adler,* 65 Md. 162, 4 Atl. 121, the plaintiffs shipped a quantity of oil clothing from New York to the South. It was packed in boxes and on arrival at destination it was found to be injured and practically worthless, either by spontaneous combustion or some chemical action arising in the goods itself. The court properly held that this was not a marine peril, but said:

> "*There is no doubt of the liability of the defendant company, under its policy, had the ship taken fire, and the goods have been consumed, or had the fire originated from any of the perils insured against;* but the question is a very different one when, as in this case, the goods are in good faith insured, and believed both by plaintiffs and defendant not to be liable to spontaneous combustion by reason of their inherent infirmity, but which in fact were so liable, and were so injured."

And the court then quotes from Parsons on Contracts (Vol. 2, p. 374, Sec. 6), as follows:

> "It is another rule that insurers are not liable for property destroyed by the effect of its own inherent

> deficiencies or tendencies, *unless these tendencies are made active and destructive by a peril insured against. Thus, if hemp which was dry when laden be afterwards wet by a peril of the sea, and by reason of such wet ferments or rots or burns, the insurers would be liable.*"

The court also quoted from Parsons on The Law of Marine Insurance (Vol. 21, p. 216), as follows:

> "It is also a rule that the insurers are liable for no subject-matter of insurance which is destroyed by reason of its own inherent defects or tendencies. *But this rule does not apply to tendencies which are called into activity only by a peril insured against.*"

The court further said:

> "In this case it is very clear that the goods were injured by their own inherent infirmity, and that such inherent infirmity was *not* called into activity by any peril insured against."

It is clear that the court would have otherwise decided had the fire in the goods been brought into activity by one of the perils insured against.

The stranding in the case at bar frustrated the venture occasioning a delay which caused the bananas to rot and necessitated their dumping before destination reached, and as stranding is a peril of the sea it was one of the perils insured against and the insurer is clearly liable.

In the case of *Firemen's Fund Ins. Co. vs. Trojan Powder Co.*, 253 Fed. 305, (C. C. A. 9th Ct.), the policy insured a cargo of explosives on the Steamship Pleiades from San Francisco to Balboa, which vessel *was stranded* off the coast of Mexico, and when the ship was subsequently

floated, because of her damaged condition she was unable to proceed on her voyage and was taken back to San Francisco, where the cargo was discharged into lighters. The explosives had been sold to the Panana Canal Commission with the right on the part of the commission to refuse to receive the ship if it did not arrive at a fixed time, she stranded, and there being no other market the plaintiff shipped them on another steamer and had to pay additional freight, which it was allowed to recover from the insurer as a particular charge under the British Insurance Law. In that case the point was also raised that the stranding was not the proximate cause of the extra expense to which the plaintiff was put, but the court, at p. 311, said:

> "Nor are we able to sustain the contention of the plaintiff in error that the *stranding* of the Pleiades was not the proximate cause of the extra expense to which the insured was necessarily put. *It was, as we view it, the sole cause.*"

The Circuit Court of Appeals dismisses this case (R. 44) with but cursory comment, but perusal will indicate it is much in point as indicating by the Ninth Circuit a viewpoint wholly at variance with the decision here.

In a recent work entitled "Inland Marine Insurance," by Earl Appleman, Esq., of the New York Bar, published in 1934, at pp. 42-43, the author succinctly states the governing law. He there says:

> "The question frequently arises as to whether natural deterioration of perishable cargoes caused by delay due to heavy weather or a peril insured against is covered by the term perils of the seas. It seems to be well settled that damage due merely to delay caused by heavy weather is not covered. The courts take the position that heavy weather is to be expected

and that prolongation of the voyage thereby is not a sea peril. *However, if the delay to which the deterioration is due be caused by a sea peril, the loss has been held to be covered.*"

"In Brandyce v. U. S. Lloyds, Inc. [The Corsicanna case], a vessel carrying a cargo of potatoes from New York to Cuba was damaged by collision with some unknown object and had to put in to Charleston for repairs. It became necessary to discharge the cargo; and as the delay caused the potatoes to rot and sprout, they were sold at a loss. The court held that the proximate cause of the loss was collision, a peril insured against, and hence that the underwriters were liable. In Tudor v. New England Mutual Marine Insurance Co., a ship carrying a cargo of ice sprang a leak and had to put in to a port of refuge. The ice, found to be melting due to contact with sea water, was sold at a loss, and it was held that the loss was caused by a peril of the sea."

And on note 1, p. 43, the author has this to say:

"In Pink v. Fleming, L. R. 25 Q. B. D. 396 (1890), a contrary result was reached, *but the court admitted that the American decisions were not in accord with the Enlish decisions on this point.* As was pointed out in the Brandyce case later decisions of the English courts have cast doubt on the authority of Pink v. Fleming."

And in *Winter on Marine Insurance*, 2nd Ed. (1929), p. 97, it is said

"A recent decision in New York, while confirming this general rule, held that where the delay resulted from a marine peril and, as a consequence of such delay, deterioration commenced, the underwriter was liable for the resultant loss, the proximate cause of the loss being the marine peril and *not* the delay."

And there is not a single American authority cited by these authors, cited elsewhere, or cited below in the instant case, conflicting with the argument here advanced.

The Circuit Court of Appeals (R. 40), concedes that in dealing with a question of this kind "the proximate and not the remote cause of the loss is to be considered * * *", but states that this rule is "applied with greater strictness in the case of marine insurance than in other cases," and cites Arnould on Marine Insurance and Average, a British publication, in support of that statement. That, however, is not in accord with the American law for the American cases all hold that the rule should be applied with greater liberalty in construing marine insurance contracts than in other cases

(*The Northwestern-Clinchfield Fuel Co. vs. Aetna Ins. Co.*, 1923 A. M. C. 1.)

where the American cases are fully discussed. Furthermore, the Circuit Court of Appeals does not even suggest that the stranding in this case, was not the cause of the loss of petitioner's bananas, but contents itself by relying solely on the authority of the British cases.

To support its decision in this case it also relies on a decision of the U. S. District Court (S. D. N. Y.), *The Casey*, 39 Fed. (2nd) 136, which was a *general average case* and in which case in speaking of *The Corsicanna*, Judge Woolsey said:

> "In Brandyce v. United States Lloyds, Inc., 207 App. Div. 665, 203 N. Y. S. 10, *the question involved was merely that of proximate cause in an action on an insurance policy.*"

This indicates that Judge Woolsey was clearly of the opinion that the question of proximate cause, which is the paramount and sole question here, was there properly decided as the accepted American law.

The Circuit Court of Appeals also suggests that the case of *Cory vs. Boyleston Fire & Marine Ins. Co.*, 107 Mass. 140, 9 Am. Rep. 14, which was decided by the same Court that decided *Tudor vs. New England Ins. Co., supra,* supports the English decisions (R. 7.), as also the case of *Perry vs. Cobb,* 88 Me. 435, but we respectfully submit these decisions clearly do *not* support the proposition.

In those cases *sailing vessels* were delayed by bad weather, and, on arrival at the respective ports of destination, it was found that the cargoes had deteriorated which damage the insured claimed was due to the delay.

The decisions in these cases are by no means inconsistent with the position of the Petitioner. It is a well-known fact that nothing is more uncertain than the time which will be employed by a sailing vessel in completing her voyage. Headwinds and calms will cause delay, and storms may lead to an alteration of the vessel's course. A voyage between distant points may require different periods of time according to the weather encountered. Now it is a well settled principle that marine insurance covers only "extraordinary and unforeseen perils" and not the ordinary vicissitudes of the voyage.

Hazard v. New Eng. Ins. Co., 8 Peters, 557, at p. 585;
Barnewall v. Church, 1 Caines, 217, at p. 234.

The mere fact, therefore, that a sailing vessel is delayed by headwinds, calms or even by storms is not a "peril of the sea,"—such delay is merely an ordinary incident of a voyage *in a sailing ship*. Even if it were made to appear that a part of the delay was occasioned by weather that was extraordinary, such as a tempest, it would be impossible to discriminate between the different causes of damage and apportion part to delay due to sea perils and part to the vicissitudes of the voyage. The impossibility of apportionment is the very ground on which the case of *Martin v. Salem Ins. Co.*, 2 Mass. 420, at 429, is decided.

It is a matter worthy of note that despite manifest energetic endeavors by counsel for the Respondent, *they have been unable to find a single American case where, on similar facts, the decision was in favor of the insurance company.* On the other hand, in *Tudor v. New England Ins. Co.* (12 Cush. 554), where the facts were precisely the same, the decision was in favor of the assured which is fully covered *supra*. In the *Tudor* case ice was shipped from Boston to Calcutta on May 1, 1850. On May 23rd the vessel sprang a leak. A few weeks later it was decided to put into port and on June 30th the vessel arrived at Bahia, a Brazilian port just south of the Equator. In order to repair the vessel it was necessary to discharge the ice, which made an immediate sale imperative. A small portion of the ice had been melted by contact with sea water, but this, of course, would have entitled the assured to recover only a comparatively small sum, whereas the Court held that the loss was total.

This brings us to the case of *Cory v. Boylston Ins. Co.*, 107 Mass. 140, suggested as authority in support of the decision in the case at bar.

It would certainly be unusual for the Massachusetts court to overrule a prior decision by a strong bench without any suggestion to that effect. It should further be noted that *Tudor v. New England Ins. Co.* was decided only two years after *Baker v. Manufacturers Ins. Co.*, 12 Gray 603, one of the sailing vessel cases relied on by the Respondent, so that the Court evidently considered that a different principle was involved; and the *Tudor* case was specifically approved in *Musgrave v. Mannheim Ins. Co.*, 32 Nova Scotia, 405.

The decisions in *Tudor v. Ins. Co.* and other similar cases cited by the Circuit Court of Appeals, and the *Cory* case, are not inconsistent.

The stranding of a vessel, such as in the case at bar, resulting in the total destruction of her cargo, is proximately caused by perils of the sea.

On the other hand, where there is mere delay on the voyage from normal and natural causes, and the goods arrive a week or two late, there can be no convincing proof that the loss has been in fact due to a sea peril. The condition of the goods on shipment may have been such that even had they arrived in due course they would have been spoiled, nor does mere delay, in and of itself, even though due to rough weather, show that a sea peril has been encountered. Rough seas and gales are an incident to almost every sea voyage, and a delay due to such causes could not be said to be occasioned by perils of the seas—unless extraordinary!

Perry v. Cobb, 88 Maine, 435, also cited by the Circuit Court of Appeals (R. 42), is in the same category as *Cory v. Boylston Ins. Co.*

Whatever force as an authority it might have had, however, it loses by reason of the fact that the court merely refused to set aside an *arbitration award* made pursuant to an agreement of mutual insurance between certain lime manufacturers.

Furthermore, the quotation from *Cory v. Boylston,* cited in the adverse opinion of the Circuit Court of Appeals (R. 42), very forcefully supports the argument here made by the petitioner as an examination of that case will show that the peril there claimed was a mere *normal* prolongation or retardation of the voyage and not a sea peril operating on the cargo as the proximate and efficient cause, as in the case at bar. This is equally true of the *Perry v. Cobb* case.

As to the rider (R. 19-20) it can be no bar to petitioner's claim for it is fair to assume that the parties (two American corporations) contracted in accordance with the law of the land where the contract was made, executed and delivered, and *that* law justifies recovery under the general clause sued on. Respondent's position indeed has been wobbly. Before the District Court it contended that the rider would have specifically covered the present total loss had it not been cancelled. In the Appellate Court, however, when in our opening, we pointed out that the rider had only to do with a *partial* loss, Respondent's counsel admitted the fact and conceded that it did not cover the loss here claimed. The weight of our contention was manifest, for Respondent's counsel, after first discussing the point orally, asked leave to file a special brief on the point, which was *immediately* handed the court, and having, of necessity, been prepared *in advance of the hearing.*

The District Court's opinion was based on the first (total loss) assumption, but it is clear that the second (partial loss) assumption is correct, and it is wholly improper to find that the language of a *partial* loss provision qualifies *or limits, by implication,* a *total* loss provision. In any event, the rider had been cancelled long before the stranding and loss. The policy was dated June 23rd, 1933, the rider first attaching April 4th, 1934, was cancelled January 25th, 1935 and the stranding occurred July 21st, 1935. The rider provided that after its cancellation "All other terms and conditions remained unchanged" (R. 20), and also that after January 16, 1935 and thereafter, the policy covered *"the same as prior to the attachment of that endorsement"* (R. 17).

We are, therefore, relegated to the rights of the parties under the clause sued on as they existed prior to the rider's attaching, which rights are clear under the American law we have cited, and permit recovery in a case such as this, and which is the law of the land where the contract was made. The payment of an additional premium of .35¢ for the rider coverage, so much stressed, is merely atmosphere, but readily enough answered for it is apparent the rider added materially to the coverage in that partial loss claims are much more frequent, and in the aggregate much more costly to insurers, than the relatively infrequent total loss claims, particularly when the former has attached to *"such losses"* the breakdown clause adding many categories under which partial losses could be recovered. This was without application to total loss claims hence the 25¢ rate therefor. And, incidentally, having regard for the voyages insured, viz., from the West Indies to Baltimore, and perusing the clause on which we sued, together with subsequent rider restrictions (R. 5, 6, 11, et cet.), it will be seen that if the

perils of the sea coverage, such as here claimed, was omitted there would be relatively no coverage of *practical* importance which the assured had under that policy.

It certainly can not be fairly said that conditions prescribed for a partial loss situation are applicable as determining a total loss situation. The Court's statement, therefore, that the contention is without point does not seem well founded, since if the place of contract execution and final performance are factors and the contract is to be construed in accordance with American law, as we say it should, *delay* is but an incident or consequence of the stranding (peril of the sea) provision under which we claim, and it can hardly be fairly said that the parties placed any other construction upon it. Surely the inference is that they regarded the clause in the light of American decisions and not of the British law.

It strikes us as very fine spun reasoning to say that Petitioner was insured against "* * * loss caused by stranding but * * * not against loss from delay *incident* to stranding" (R. 45-6), for such reasoning is contradictory since, if we are not entitled to all the damage or loss *incident* to stranding, including delay, the stranding provision is without meaning.

We think the rider considered alone or in connection with the general clause presents no ambiguity and that it is clear the former has no bearing upon the latter, but if the contrary contention of respondent raises an ambiguity and clarification is desired, it should be had by oral testimony which the Record pages 27-28 shows it was hopeless to attempt. However, we submit, having regard for the American law, there can be no ambiguity.

The Petitioner contends, and has contended in both lower courts, that a loss such as here suffered was within the terms of the general clause of the policy (R. 2-3) as decided by The Corsicanna and other American cases herein referred to and, therefore, the rider pleaded (which was *not* a part of the insurance contract at the time of the loss) can not and does not add to or subtract from that clause, as, in fact, said clause covered the loss here sued on.

Assuming, however, *arguendo*, that at the time the rider was entered into the insured was under the impression that he was *not* covered under the general clause for a loss such as here sued on, and actually had this rider attached to cover a loss such as here, which it is conceded by respondent's counsel it did not, could it be argued that after he had later determined that he was covered by the general clause (as practically all American cases hold) and he then stopped paying the additional premium charged him for this rider, and cancelled it, that the effect would be that he would lose the coverage he had under the general clause?

Assuming also, *arguendo*, that after he had paid the additional premium charged for the rider he consulted counsel about the rider and stated he was only interested in being covered for losses to his fruit caused by delays arising from perils of the sea, such as stranding, and that he did not care to pay additional premiums if the general clause covered such losses, and counsel advised him that under the law of America, where his contract was made, as enunciated in this brief, he was covered under the general clause, and acting on such advice he cancelled the rider to save premiums, could it be logically argued that his once having had such a rider took away his coverage under the general clause? or

Assuming again, *arguendo*, that he heard "on the street" that he was paying additional premiums for coverage he already had, and in consequence thereof cancelled the rider, could it be said that the acquiring of this information, though belated, deprived him of the coverage which the courts of his land had decided he had under the clause in question?

So that from whatever aspect we view the rider, it is quite apparent that the test is what was the scope of *its* coverage and the coverage under the *general clause*, and really the sole question here is was the Circuit Court of Appeals right in construing an American made contract by British decisions solely because this court sometime since has said that it was desirable to have the law of the two countries in harmony?

Clearly, before an insurance company could cut down its coverage, as determined by judicial decisions, it would have to be done by the most clear and unequivocal language and not by inserting a rider which covers numerous contingencies, affecting only partial loss claims, and which does not specifically refer to the general clause nor have any application to the particular loss sued on.

But this argument is really academic for the respondent disavowed its original contention below and was forced to admit at the bar of the Circuit Court of Appeals that the rider had nothing to do with the case other than "by inference," although they then argued that that inference should limit an actual contractual obligation which had been imposed long ago by the judicial decisions of this country.

That the decision of the Circuit Court of Appeals in this case has caused hopeless confusion in the law on an

important contract of this kind, which is in general use, is best illustrated by the fact that in any case where the amount involved is less than $3,000.00, even though diversity of citizenship does exist, or where the amount involved is unlimited where diversity of citizenship does not exist, the insured by bringing his suit in the State forum would recover a loss such as here, but where diversity of citizenship exists and the amount in controversy is in excess of $3,000 the insured could not recover for, of course, the insurer would remove the case to the Federal Court. In Baltimore City for instance as the State court is just across the street from the Federal court, it means that the construction put on this contract depends solely on whether you happen to be on the West or East side of the street—and this case was so removed. Certainly, in a situation of this kind, rank injustice is clearly done one party or the other and which it would seem calls for the intervention and action of this Honorable Court.

And finally we reiterate the language of Mr. Justice STORY in *Magoun v. New England Marine Ins. Co., supra,* that a decision other than in accordance with our contention *"would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils."*

It is respectfully submitted that the *writ of certiorari* prayed for should be granted.

GEORGE FORBES,
HENRY L. WORTCHE,
Counsel for Petitioner.

(Emphasis ours throughout.)

Dated at Baltimore, Md., May 11, 1937.

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